

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 7
901 NORTH FIFTH STREET
KANSAS CITY, KANSAS 66101

IN THE MATTER OF:

NEBRASKA PUBLIC POWER DISTRICT)

NOTICE OF VIOLATION

Proceedings Pursuant to Section 113)
of the Clean Air Act,)
42 U.S.C. §§ 7413)
_____)

NOTICE OF VIOLATION

This Notice of Violation ("NOV") is issued to the Nebraska Public Power District ("NPPD"), for violations of the Clean Air Act ("CAA" or "Act") at its Gerald Gentleman Station. Specifically, NPPD has violated Title I of the CAA by failing to comply with the Prevention of Significant Deterioration (PSD) requirements of the CAA and the Nebraska State Implementation Plan (SIP). NPPD has also violated Title V of the CAA by failing to address the PSD provisions of the CAA as applicable requirements in its Title V permits for the Gerald Gentleman Station. This NOV is issued pursuant to Section 113 of the Act, as amended, 42 U.S.C. § 7413. The authority to issue this NOV has been delegated to the Regional Administrator of the United States Environmental Protection Agency ("EPA") Region 7 and further re-delegated to the Director, Air and Waste Management Division, U.S. EPA, Region 7.

SUMMARY OF VIOLATION(S)

1. Units 1 and 2 at the Gerald Gentleman Station began commercial service in 1979 and 1982, respectively. During the 1990's and early 2000's, NPPD undertook major capital projects at the Gerald Gentleman Station to restore lost capacity and gain new capacity resulting in more electrical generation. These projects include, but are not limited to, induced draft fan and boiler feed pump replacements at Unit 1 in 1991, a boiler reheater replacement at Unit 2 in 1998-1999, and baghouse retrofits at Unit 1 from 1998-2000 and at Unit 2 in 2001. One or more of these projects is a major modification that resulted in a significant net emissions increase of one or more regulated pollutants. Since as early as 1991 for Unit 1 and 1998 for Unit 2, and continuing to the present, NPPD has modified and operated the Gerald Gentleman Station Units 1 and 2 without complying with the PSD program, including, inter alia, obtaining PSD permits authorizing the construction and operation of the physical modifications of these units and installing Best Available Control Technology (BACT), as required by the statute and implementing regulations. These violations will continue until NPPD complies with the Clean Air Act requirements and installs and operates BACT.

2. The Gerald Gentleman Station is located in an area that has at all relevant times been classified as attainment or unclassifiable for NO₂, SO₂, PM₁₀ and ozone. Accordingly, the PSD provisions of Part C, Title I of the Clean Air Act ("CAA") and the Nebraska SIP apply to modifications made at the plant. Nevertheless, NPPD failed to obtain a PSD permit and install best available control technology for these projects occurring at Gerald Gentleman Station, Units 1 and 2 between 1991 and 2001.

3. Under the applicable Title V permit regulations, NPPD was required to identify all applicable requirements, identify a compliance schedule for those applicable requirements for which the Gerald Gentleman Station was not already in compliance, and to certify its compliance with all applicable requirements. NPPD's Title V permit for the Gerald Gentleman Station does not address PSD.

4. These violations of the Act and the Nebraska SIP have resulted in the release of significant quantities of SO₂, NO_x, PM and/or PM₁₀ into the environment. Until these violations are corrected, Units 1 and 2 at the Gerald Gentleman Station will continue to release significant illegal quantities of SO₂, NO_x, PM and/or PM₁₀ into the environment.

RELEVANT STATUTORY AND REGULATORY BACKGROUND

5. When the Act was passed in 1970, Congress exempted existing facilities from many of its requirements. However, in the 1977 CAA Amendments, Congress also stated that this exemption would not last forever. As the United States Court of Appeals for the D.C. Circuit explained in Alabama Power v. Costle, 636 F.2d 323 (D.C. Cir. 1979), "the statutory scheme intends to 'grandfather' existing industries; but . . . this is not to constitute a perpetual immunity from all standards under the PSD program." Rather, the Act requires grandfathered facilities to install modern pollution control devices whenever the unit is proposed to be modified in such a way that its emissions may increase.

6. The PSD provisions of Part C of Title I of the Act require preconstruction review and permitting for modifications of stationary sources. Pursuant to applicable regulations, if a major stationary source located in an attainment area is planning to make a major modification, then that source must obtain a PSD permit. To obtain this permit, the source must agree to put on BACT.

7. The Nebraska SIP includes the Nebraska Air Quality regulations pertaining to Prevention of Significant Deterioration of Air Quality, found at Title 129, Chapter 19 of the Nebraska Administrative Code (NAC). Title 129, Chapter 19 of the NAC was originally approved as part of the Nebraska SIP by EPA on July 23, 1984, at 49 Fed. Reg. 29,597, and since amended and approved on May 16, 1989 (54 Fed. Reg. 21,059); July 2, 1991 (56 Fed. Reg. 30,335); October 7, 1991 (56 Fed. Reg. 50,515); January 4, 1995 (60 Fed. Reg. 372); February 9, 1996 (61 Fed. Reg.

4899); and May 29, 2002 (67 Fed. Reg. 37,325). *See* 40 C.F.R. §§ 52.1420 to 52.1436.

8. Pursuant to Title 129, Chapter 19 of the NAC, the regulations at 40 C.F.R. § 52.21 as they existed on July 1, 1997, pertaining to Prevention of Significant Deterioration, are incorporated by reference into the Nebraska Air Quality regulations.

9. As of July 1, 1997, the regulation at 40 C.F.R. § 52.21(i)(1) provides that “[n]o stationary source or modification to which the requirements of paragraphs (j) through (r) of this section apply shall begin actual construction without a permit which states that the stationary source or major modification will meet those requirements.”

10. As of July 1, 1997, the regulation at 40 C.F.R. § 52.21(i)(2) provides that “[t]he requirements of paragraphs (j) through (r) of this section shall apply to any major stationary source and any major modification with respect to each pollutant subject to regulation under the Act . . .”

11. As of July 1, 1997, the regulations at 40 C.F.R. § 52.21(b)(1)(i)(a) define a “major stationary source” as any stationary source within one of 28 source categories which emits, or has the potential to emit, 100 tons per year or more of any air pollutant subject to regulation under the Act. Fossil fuel-fired steam electric plants of more than 250 million British thermal units per hour heat input are included among the 28 source categories.

12. As of July 1, 1997, the regulations at 40 C.F.R. § 52.21(b)(2)(i) define “major modification” as any “physical change in or change in the method of operation of a major stationary source that would result in a significant net emissions increase of any pollutant subject to regulation under the Act.”

13. As of July 1, 1997, the regulation at 40 C.F.R. § 52.21(b)(3)(i) defines “net emissions increase” as the amount by which the sum of the following exceeds zero: (a) any increase in actual emissions from a particular physical change or change in the method of operation at a stationary source; and (b) any other increases and decreases in actual emissions at the source that are contemporaneous with the particular change and are otherwise creditable.

14. As of July 1, 1997, the regulation at 40 C.F.R. § 52.21(b)(23) defines “significant” and states that in reference to NO_x, SO₂, PM and PM smaller than 10 microns (PM₁₀), significant net emissions increase means an emissions rate that would equal or exceed 40 tons or more per year of NO_x, 40 tons or more per year of SO₂, 25 tons or more per year of PM, and 15 tons or more per year of PM₁₀.

15. As of July 1, 1997, the regulation at 40 C.F.R. § 52.21(r)(1) states that any owner or operator of a source or modification subject to 40 C.F.R. § 52.21 who commences construction after the effective date of the PSD regulations without applying for and receiving a PSD permit,

shall be subject to appropriate enforcement action. 40 C.F.R. § 52.21(r)(1).

16. The Nebraska SIP provisions identified in paragraphs 7 and 8 above, which incorporate by reference the provisions identified in paragraphs 9 through 15 above, are federally enforceable pursuant to Sections 110 and 113 of the Act, 42 U.S.C. §§ 7410 and 7413.

17. Pursuant to Section 502(a) of the Act, 42 U.S.C. § 7661(a), it is unlawful to operate without or in violation of a permit issued pursuant to subchapter V of the Act, 42 U.S.C. §§ 7661 *et. seq.*

18. Nebraska's program under subchapter V of the Act was granted final approval on October 18, 1995 (60 Fed. Reg. 53,872). These regulations are currently codified at Title 129 of the Nebraska Administrative Code. Pursuant to NAC, chapter 5, § 005, a stationary source may not operate, unless it is in compliance with a class I operating permit. Pursuant to Section 113(a)(3) of the Act, 42 U.S.C. § 7413(a)(3), the EPA Administrator is authorized to take enforcement action for any violation of any requirement under subchapter V of the CAA, including, but not limited to, a requirement or prohibition of any rule, plan, order, waiver, or permit promulgated, issued or approved under that provision or subchapter.

19. NAC, chapter 7, § 006.02D requires that a source submit an application that includes the citation and description of all applicable requirements and other specific information that may be necessary to determine the applicability of such requirements.

20. NAC, chapter 7, § 006.02H2(c) requires that a permit application contain a compliance plan for emission units or stationary sources that are not in compliance with all applicable requirements at the time of permit issuance.

21. NAC, chapter 7, § 006.02I1 requires that a permit application must contain a certification of compliance with all applicable requirements.

22. NAC, chapter 7, § 006.02I3 requires that a source submit compliance certifications annually or more frequently as specified in the applicable requirement or by the department.

23. Pursuant to 40 C.F.R. § 70.1(b), all subject sources shall have Title V permit which ensures compliance with all applicable requirements.

ENFORCEMENT

24. Section 113(a)(1) of the Act, 42 U.S.C. § 7413(a)(1), provides that at any time after the expiration of 30 days following the date of the issuance of this NOV, the Administrator may, without regard to the period of violation, issue an order requiring compliance with the requirements of the state implementation plan or permit, and/or bring a civil action pursuant to

Section 113(b) for injunctive relief and/or civil penalties of not more than \$25,000 per day for each violation occurring before January 31, 1997; \$27,500 per day for each violation occurring on or after January 30, 1997; and \$32,500 per day for each violation occurring on or after March 15, 2004. Sections 113(a)(3) and 113(b) also provide that the Administrator may take the same actions to enforce violations of subchapter V of the Act, 42 U.S.C. §§ 7661 *et. seq.*

25. Section 167 of the Act, 42 U.S.C. § 7477, authorizes the Administrator to initiate an action for injunctive relief as necessary to prevent the construction, modification or operation of a major emitting facility which does not conform to the PSD requirements.

26. As provided in Sections 113(a)(1), 113(b) and 167 of the Act, 42 U.S.C. §§ 7413(a)(1), 7413(b) and 7477, the violations set forth above subject NPPD to injunctive relief and civil penalties.

27. The issuance of this NOV does not preclude the State of Nebraska or the EPA from assessing penalties, or taking any action authorized by the Act. This NOV does not affect the obligation of NPPD to comply with all applicable federal, state, and local regulations.

PENALTY ASSESSMENT CRITERIA

28. Section 113(e)(1) of the Act, as amended, 42 U.S.C. § 7413(e)(1), states that the court, in an action for assessment of civil or criminal penalties, shall, as appropriate in determining the amount of penalty to be assessed, take into consideration (i.e., in addition to such other factors as justice may require) the size of the business, the economic impact of the penalty on the business, the violator's full compliance history and good faith efforts to comply, the duration of the violation as established by any credible evidence, payment by the violator of penalties previously assessed for the same violation, the economic benefit of non-compliance, and the seriousness of the violation.

29. Section 113(e)(2) of the Act, 42 U.S.C. § 7413(e)(2) allows the court to assess a penalty for each day of violation. For purposes of determining the number of days of violation, where the United States makes a prima facie showing that the conduct or events giving rise to this violation are likely to have continued or recurred past the date of the NOV, or a previously issued air pollution control agency NOV, or the previous NOV, and each and every day thereafter, until respondent establishes that continuous compliance has been achieved; except to the extent that respondent can prove by the preponderance of the evidence that there were intervening days during which no violation occurred or that the violation was not continuing in nature.

OPPORTUNITY FOR CONFERENCE

30. Respondent may, upon request, confer with EPA. The conference will enable Respondent to present evidence bearing on the finding of violation, on the nature of violation,

and on any efforts it may have taken or proposes to take to achieve compliance. Respondent has the right to be represented by counsel. A request for a conference must be made within 10 days of receipt of this NOV, and the request for a conference or other inquiries concerning the NOV should be made in writing to:

Alex Chen
Assistant Regional Counsel
U.S. EPA, Region 7
901 N. 5th Street
Kansas City, Kansas 66101
(913) 551-7962

31. By offering the opportunity for a conference or participating in one, EPA does not waive or limit its right to any remedy available under the Act.

DISCLOSURE INFORMATION

32. Certain companies may be required to disclose to the Securities and Exchange Commission ("SEC") the existence of certain pending or known to be contemplated environmental legal proceedings (administrative or judicial) arising under federal, state or local environmental laws. Please see the attached "Notice of Securities and Exchange Commission Registrants' Duty to Disclose Environmental Legal Proceedings" for more information about this requirement and to aid you in determining whether your company may be subject to the same.

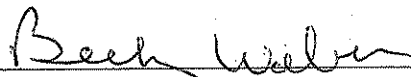
33. EPA is enclosing an Information Sheet entitled "U.S. EPA Small Business Resources" (EPA 300-F-99-004, September 1999), which identifies a variety of compliance assistance and other tools available to assist small businesses in complying with federal and state environmental laws.

EFFECTIVE DATE

34. This NOV shall become effective immediately upon issuance.

Date

12/8/08


Becky Weber, Director

Air and Waste Management Division

NOTICE OF SECURITIES AND EXCHANGE COMMISSION REGISTRANTS' DUTY TO DISCLOSE ENVIRONMENTAL LEGAL PROCEEDINGS

Securities and Exchange Commission regulations require companies registered with the SEC (e.g., publicly traded companies) to disclose, on at least a quarterly basis, the existence of certain administrative or judicial proceedings taken against them arising under Federal, State or local provisions that have the primary purpose of protecting the environment. Instruction 5 to Item 103 of the SEC's Regulation S-K (17 CFR 229.103) requires disclosure of these environmental legal proceedings. For those SEC registrants that use the SEC's "small business issuer" reporting system, Instructions 1-4 to Item 103 of the SEC's Regulation S-B (17 CFR 228.103) requires disclosure of these environmental legal proceedings.

If you are an SEC registrant, you have a duty to disclose the existence of pending or known to be contemplated environmental legal proceedings that meet any of the following criteria (17 CFR 229.103(5)(A)-(C)):

- A. Such proceeding is material to the business or financial condition of the registrant;
- B. Such proceeding involves primarily a claim for damages, or involves potential monetary sanctions, capital expenditures, deferred charges or charges to income and the amount involved, exclusive of interest and costs, exceeds 10 percent of the current assets of the registrant and its subsidiaries on a consolidated basis; or
- C. A governmental authority is a party to such proceeding and such proceeding involves potential monetary sanctions, unless the registrant reasonably believes that such proceeding will result in no monetary sanctions, or in monetary sanctions, exclusive of interest and costs, of less than \$100,000; provided, however, that such proceedings which are similar in nature may be grouped and described generically.

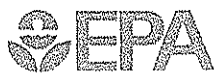
Specific information regarding the environmental legal proceedings that must be disclosed is set forth in Item 103 of Regulation S-K or, for registrants using the "small business issuer" reporting system, Item 103(a)-(b) of Regulation S-B. If disclosure is required, it must briefly describe the proceeding, "including the name of the court or agency in which the proceedings are pending, the date instituted, the principal parties thereto, a description of the factual basis alleged to underlie the proceedings and the relief sought."

You have been identified as a party to an environmental legal proceeding to which the United States government is, or was, a party. If you are an SEC registrant, this environmental legal proceeding may trigger, or may already have triggered, the disclosure obligation under the SEC regulations described above.

This notice is being provided to inform you of SEC registrants' duty to disclose any relevant environmental legal proceedings to the SEC. This notice does not create, modify or interpret any existing legal obligations, it is not intended to be an exhaustive description of the legally applicable requirements and it is not a substitute for regulations published in the Code of Federal Regulations. This notice has been issued to you for information purposes only. No determination of the applicability of this reporting requirement to your company has been made by any governmental entity. You should seek competent counsel in determining the applicability of these and other SEC requirements to the environmental legal proceeding at issue, as well as any other proceedings known to be contemplated by governmental authorities.

If you have any questions about the SEC's environmental disclosure requirements, please contact the Office of Chief Counsel in the SEC's Division of Corporation Finance. The phone number is (202) 942-2900.

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Office of Enforcement and Compliance Assurance
INFORMATION SHEET

U. S. EPA Small Business Resources

If you own a small business, the United States Environmental Protection Agency (EPA) offers a variety of compliance assistance resources such as workshops, training sessions, hotlines, websites, and guides to assist you in complying with federal and state environmental laws. These resources can help you understand your environmental obligations, improve compliance, and find cost-effective ways to comply through the use of pollution prevention and other innovative technologies.

Compliance Assistance Centers

(www.assistancecenters.net)

In partnership with industry, universities, and other federal and state agencies, EPA has established Compliance Assistance Centers that provide information targeted to industries with many small businesses.

Agriculture

(www.epa.gov/agriculture or 1-888-663-2155)

Automotive Recycling Industry

(www.ecarcenter.org)

Automotive Service and Repair

(www.ccar-greenlink.org or 1-888-GRN-LINK)

Chemical Industry

(www.chemalliance.org)

Construction Industry

(www.cicacenter.org or 1-734-995-4911)

Education

(www.campuserc.org)

Healthcare Industry

(www.hercenter.org or 1-734-995-4911)

Metal Finishing

(www.nmfr.org or 1-734-995-4911)

Paints and Coatings

(www.paintcenter.org or 1-734-995-4911)

Printed Wiring Board Manufacturing

(www.pwbrc.org or 1-734-995-4911)

Printing

(www.pneac.org or 1-888-USPNEAC)

Transportation Industry

(www.transource.org)

Tribal Governments and Indian Country

(www.epa.gov/tribal/compliance or 202-564-2516)

US Border Environmental Issues

(www.bordercenter.org or 1-734-995-4911)

The Centers also provide State Resource Locators

(www.envcap.org/statetools/index.cfm) for a wide range of topics to help you find important environmental compliance information specific to your state.

EPA Websites

EPA has several Internet sites that provide useful compliance assistance information and materials for small businesses. If you don't have access to the Internet at your business, many public libraries provide access to the Internet at minimal or no cost.

EPA's Home Page

www.epa.gov

Small Business Gateway

www.epa.gov/smallbusiness

Compliance Assistance Home Page

www.epa.gov/compliance/assistance

Office of Enforcement and Compliance Assurance

www.epa.gov/compliance

Voluntary Partnership Programs

www.epa.gov/partners

